Supreme Court, U.S.
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No. 99-1456

IN THE

Supreme Court of the United States

FLEMING SUPERMARKETS OF FLORIDA, INC.,

Petitioner,

v.

WALTER DAMON and RICHARD KANAFANI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Eleventh Circuit Court of Appeals, on the facts before it, properly ruled that the Respondent, Richard Kanafani, had established a *prima facie* case of Age Discrimination under the Age Discrimination in Employment Act, 29 U.S.C. § 623(a), given the plethora of circumstantial evidence of age discrimination presented by him in the record independent of the fact that his replacement was five years younger than him.

PARTIES TO THE PROCEEDING

The Respondents, Walter Damon and Richard Kanafani, are individuals and were plaintiffs/appellants in the proceedings below. The petition only raises issues applicable to Richard Kanafani and does not raise any issues as to Walter Damon.

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STATEMENT OF THE CASE

On January 28, 1997, Respondents, Walter Damon, ("Damon"), and Richard Kanafani, ("Kanafani"), former employees of Fleming Supermarkets of Florida, Inc., ("Fleming"), filed suit against Fleming for Age Discrimination in the United States District Court for the Southern District of Florida pursuant to the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621-634, and the Florida Civil Rights Act of 1992, Fl. Stat. Ann. §§ 760.01-760.11. *Damon v. Fleming Supermarkets of Florida, Inc.*, 196 F.3d 1354, 1357 (11th Cir. 1999). Specifically, Damon and Kanafani alleged that they were both terminated from their positions as Store Managers of Fleming's supermarket chain, Hyde Park Markets, because of their age. *Id.* at 1358.

On May 1, 1998, Fleming moved for summary judgment. On September 16, 1998, the district court granted Fleming's motion for summary judgment and made various conclusions of law. *Id.* at 1358. Specifically, the district court found that 1) Damon and Kanafani did not establish that they were qualified for their positions under the four-part test outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), 2) Damon and Kanafani did not present direct evidence of age discrimination, and 3) that Damon and Kanafani did not establish that the reasons offered by Fleming were pretextual for age discrimination. *Id.* at 1358. The district court also suggested in *dicta* that Kanafani had failed to establish that he was replaced by someone substantially younger because at the time of his termination, he was 42 years old and his replacement was 37 years old. *Id.*

Damon and Kanafani appealed the district court's order to the United States Court of Appeals for the Eleventh Circuit. On December 3, 1999, the Eleventh Circuit reversed the district court, holding that both Damon and Kanafani met their *prima facie* burdens and presented sufficient circumstantial evidence rebutting the nondiscriminatory reasons proffered by Fleming. *Id.* at 1359-65. The Eleventh Circuit remanded the case to the district court where it is currently awaiting trial.

REASONS FOR DENYING THE WRIT

The question presented in this case has no implication beyond the facts of this case. There is no fundamental principle of federal law at stake or conflicting decisions to warrant issuance of a writ of certiorari. The Eleventh Circuit applied well-settled principles of law to the facts in the record; the petitioner simply disagrees with the Circuit Court's decision. Specifically, this petition seeks review by this Court of the Eleventh Circuit's decision reversing the district court's granting of final summary judgment in favor of petitioner. Fleming contends that the Eleventh Circuit erred in holding that the five year age difference between Kanafani and his replacement sufficiently satisfied the "substantially younger" requirement of his *prima facie* case in light of this Court's holding in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996). Fleming argues that this Court should adopt an overly strict application of the *McDonnell Douglas* test in discharge cases by setting forth an arbitrary age differential of ten years between an ADEA claimant and his replacement. Fleming's argument runs counter to well settled law which holds that the *McDonnell Douglas* requirements need not be interpreted in an overly strict manner if a plaintiff "can otherwise provide

a basis for the inference that age was a factor in the employment decision." *Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1226 (11th Cir. 1993); *Mitchell v. Worldwide Underwriters Insurance Co.*, 967 F.2d 565, 567 (11th Cir. 1992); *Pace v. Southern Ry. System*, 701 F.2d 1383, 1386-87 (11th Cir.), *cert. denied*, 464 U.S. 1018 (1983).

While the *McDonnell Douglas* requirements are useful to test whether older employees were treated differently from younger employees, they are not the exclusive means by which a plaintiff can establish a *prima facie* case of age discrimination. Fleming's suggestion that this Court should set an arbitrary age limit between a plaintiff and his replacement requires the Court to overreach its authority by placing an additional burden on a plaintiff which Congress did not intend. Fleming's argument would create an absolute bar to any age discrimination claim where the age differential is less than ten years, (or some other arbitrary number exceeding five years), even if the record is replete with circumstantial evidence of age discrimination. While there is some merit to the argument that the greater the number of years between a claimant and his younger replacement, the greater the inference of age discrimination, this argument falls far from requiring an arbitrary age difference to satisfy a *prima facie* case. Courts must look to the record in its entirety on a case-by-case basis to determine whether a *prima facie* case has been satisfied.

In the instant case, notwithstanding the fact that Kanafani's replacement was five years younger than him, the record was replete with circumstantial evidence of age discrimination which the Eleventh Circuit found was sufficient to reverse the summary judgment and remand the case for trial. For example, evidence was presented of the

decisionmaker's discriminatory animus towards older store managers under his direct supervision in that within a one-year period, "*four* older, highly experienced store managers, out of a total of *seven* managers under [the decisionmaker's] *direct supervision*, were terminated or demoted, and each was replaced by an employee under forty years old." *Damon*, 196 F.3d at 1361 (emphasis in original). In fact, the decisionmaker himself conceded that "what has occurred is that older managers were either fired or demoted and replaced by younger people, and that in every instance . . . the older store managers had more years of experience than the people that replaced them." *Id.* There was additional evidence that Fleming had been placing ads for new store managers even though there were no available store manager vacancies. *Id.* Ultimately, these new hires turned out to be the younger less experienced managers who replaced the older more experienced managers, including Kanafani. *Id.* Furthermore, the same decisionmaker made a remark to Kanafani's younger successor right after Kanafani was terminated, that he wanted "aggressive, *young* men" like himself to be promoted. *Id.* at 1362 (emphasis in original). The Eleventh Circuit correctly held that this comment was "highly suggestive circumstantial evidence from which a jury could infer discriminatory animus . . . Far from being a stray remark, the comment may evince probative evidence of the state of mind of the decision-maker at the time of Kanafani's termination." *Id.* Finally, Kanafani presented additional evidence that younger employees were not subjected to the same punishment as older employees for violation of the company's work rules. *Id* at 1363-64. Notwithstanding the five year disparity between Kanafani and his replacement, as evidenced by the above, Kanafani presented ample evidence which is more than adequate to create an inference that Fleming's employment decisions regarding Kanafani were motivated by an unlawful ageist bias.

In its Petition, Fleming suggests that the Eleventh Circuit's holding was erroneous in light of this Court's decision in *O'Connor*. Specifically, Fleming relies upon this Court's language that:

> [i]n the age-discrimination context, such an inference of [illegal discrimination] cannot be drawn from the replacement of one worker with another worker insignificantly younger. Because the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class.

Id. at 312. Fleming's suggestion is wrong as it is predicated upon a misreading of *O'Connor*.

In *O'Connor*, this Court held that if the *McDonnell Douglas* test were applied to ADEA actions, one does not have to prove that they were replaced by someone outside the protected age group (40) in order to make out a *prima facie* case of Age Discrimination. 517 U.S. at 312-313. This Court opined that all a plaintiff need show is "'evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion. . . .'" *Id. quoting Teamsters v. United States*, 431 U.S. 324, 358 (1977). This Court never held that a plaintiff need show that he was replaced by someone at least ten years younger than him or some other arbitrary number. In fact, this Court reached the very same holding reached years earlier by the Eleventh Circuit in *Carter v. City of Miami*, 870 F.2d 578 (11th Cir. 1989), where the Eleventh Circuit

> declined to hold that a plaintiff's inability to show that he was replaced by someone under forty is an absolute bar to the establishment of *a* prima facie case . . . To the contrary, the establishment of a prima facie case is essentially a factual question particular to the circumstances of a given case . . . The inquiry is whether an ordinary person could reasonably infer discrimination if the facts presented remained unrebutted.

Carter, 870 F.2d at 583. It is without question that the *O'Connor* decision simply holds that in ADEA cases, one does not have to show that they were replaced by someone outside the protected age group. Fleming's argument that this Court should adopt an arbitrary age disparity, (which, not surprisingly must exceed five years, the age difference between Kanafani and his replacement), in order to state a *prima facie* case would simply turn the ADEA on its head.

In all disparate treatment actions, proof of discriminatory intent is an essential element of a plaintiff's *prima facie* case. Depending on the facts of a particular case, in some situations, as in the case *sub judice*, intent can be inferred from the "mere fact of differences in treatment." *Giles v. Ireland*, 742 F.2d 1366, 1374 (11th Cir. 1984); *accord Mitchell v. Worldwide Underwriters Insurance Co.*, 967 F.2d 565, 566 (11th Cir. 1992). Logically, the lesser the age disparity between an older employee and his younger replacement, the more likely that plaintiff will have to rely on additional circumstantial evidence of age discrimination in the form of anecdotal evidence or in the form of showing differences in treatment between older employees and younger employees.

Contrary to Fleming's position, there is no conflict between the circuits. The decisions relied upon by Fleming from the Seventh, Sixth, Eighth, and Fourth Circuits are not cases where the court was presented with a plethora of circumstantial evidence of age discrimination as was presented by Kanafani in the instant case. Each of the cases from those circuits and the instant case were all properly decided on their own unique set of facts. In the instant case, after considering the relevant facts and the applicable law, the Eleventh Circuit properly held that Kanafani presented a *prima facie* case of age discrimination and met his burden of presenting genuine issues of material fact mandating the reversal of summary judgment in favor of a trial by jury.

CONCLUSION

This case does not merit further review by this Court. Accordingly, for the foregoing reasons, Fleming's Petition should be **DENIED.**

Respectfully submitted,

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